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IN THE
COURT OF APPEALS OF INDIANA

RASHAUD N. BRANSCOMB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0701-CR-27
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Olga H. Stickel, Judge
Cause No. 20D04-0509-FD-322

June 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Rashaud N. Branscomb appeals his convictions for Fraud,[1] a class D felony, and Theft,[2] a class D felony. Specifically, Branscomb argues that the evidence seized from his vehicle was improperly admitted into evidence at trial because his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article 1, section 11 of the Indiana Constitution was violated. Finding that Branscomb has waived the issue, and observing that the search was conducted by a private citizen with no direction or acquiescence from the police, we affirm the judgment of the trial court.

FACTS

On the morning of August 1, 2005, Tom Shoff, a retired reserve police officer, left his vehicle at an Elkhart Jiffy Lube for an oil change. Later that month, Shoff noticed that several unauthorized purchases had been made with his Citgo gasoline card. Shoff knew that the only time that his vehicle had been recently out of his control was when he left it at the Jiffy Lube. Thereafter, Shoff returned to the Jiffy Lube and verified that Branscomb had been working on the day of the oil change. Shoff also learned that Branscomb had had access to the interior of his vehicle.

On August 31, 2005, Shoff and Elkhart County Sheriff's Department Officer Donald McQuaire met at a restaurant and drove to the Elkhart Green Apartments (Elkhart Green) where Branscomb resided. While Officer McQuaire waited nearby, Shoff approached Branscomb, who was standing outside. Shoff then asked Branscomb for the return of his gas

[1] Ind. Code § 35-43-5-4(c).

card. When Branscomb denied having the card, Shoff called Officer McQuaire, who had been driving around the apartment buildings. When Officer McQuaire questioned Branscomb regarding his whereabouts on the morning of August 29, 2005—the time of the last unauthorized purchase on Shoff's credit card—Branscomb replied that he had been registering his child for elementary school. Thereafter, Branscomb, Officer McQuaire, and Shoff, all drove to the school. Officer McQuaire spoke with school officials, who subsequently informed the officer that Branscomb's story was not consistent with their recollection.

At some point, Shoff returned to Elkhart Green to see if his gas card might be in Branscomb's vehicle. Shoff identified Branscomb's vehicle, noticed that it was unlocked, and opened the door. Shoff then searched the vehicle and found a crumpled Citgo receipt that matched one of the unauthorized purchases. Shoff had not informed the police that he was going to search Branscomb's vehicle, and testified that he performed the search on his "own initiative." Tr. p. 123, 203, 206.

Branscomb was charged with the above offenses, and during a jury trial that commenced on April 4, 2006, the gas receipt was admitted into evidence without objection. However, at the close of the State's case, Branscomb moved to suppress the receipt on the grounds that Shoff's search of the vehicle had been done at the State's behest. The trial court denied the motion and noted that the search "was not police action by Mr. Shoff." Id. at 241. Branscomb then moved for a mistrial, which the trial court also denied. The jury found

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[2] I.C. § 35-43-4-2.

Branscomb guilty as charged, and he was subsequently sentenced to eighteen months of incarceration on both offenses. However, the trial court suspended the sentences and ordered Branscomb to probation. Branscomb now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that we review the trial court's decision to admit or exclude evidence for an abuse of discretion. Johnson v. State, 845 N.E.2d 147, 149-50 (Ind. Ct. App. 2006), trans. denied. A trial court abuses its discretion when the ruling is clearly against the logic and effect of the facts and circumstances before the court. Farris v. State, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004). We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Marlowe v. State, 786 N.E.2d 751, 753 (Ind. Ct. App. 2003).

II. Branscomb's Claims

In addressing Branscomb's contention that the gas receipt was improperly admitted into evidence because his rights to be free from unreasonable search and seizure were violated, we note that Branscomb did not object to the admission of the gas receipt at the time it was offered into evidence at trial. Indeed, Branscomb's counsel specifically stated that he had no objection to the admission of the receipt. Tr. p. 195. Thus, the issue is waived. See Purifoy v. State, 821 N.E.2d 409, 412-13 (Ind. Ct. App. 2005) (holding that a contemporaneous objection is generally required to preserve an issue for appeal), trans. denied. Moreover, Branscomb has cited no authority—and we have found none—suggesting

that the subsequent motion for a mistrial negated his obligation to lodge a timely objection to the admission of the evidence. Indeed, crafting an exception to this rule by allowing a party to move for a mistrial instead of objecting to the admission of evidence in a timely manner would effectively nullify that well-established rule.

Waiver notwithstanding, we note that the Fourth Amendment to the United States Constitution generally prohibits warrantless searches. Edwards v. State, 762 N.E.2d 128, 132 (Ind. Ct. App. 2002). The purpose of the Fourth Amendment to the United States Constitution is to protect the privacy and possessory interests of individuals by prohibiting unreasonable searches and seizures. Barfield v. State, 776 N.E.2d 404, 406 (Ind. Ct. App. 2002). If a warrantless search is conducted, the burden is on the State to prove that, at the time of the search, an exception to the warrant requirement existed. Id. That is, searches conducted without a warrant are per se unreasonable subject to a few well-delineated exceptions. Johnson v. State, 766 N.E.2d 426, 432 (Ind. Ct. App. 2002).

On the other hand, we note that a search or seizure conducted by a private party does not implicate the Fourth Amendment or Article 1, section 11 of the Indiana Constitution. Bone v. State, 771 N.E.2d 710, 714 (Ind. Ct. App. 2002). Indeed, an individual's right to be free from unreasonable searches and seizures under the Indiana Constitution is a right that is judged upon the standard of "the reasonableness of the official behavior." Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994) (emphasis added). In other words, this protection is from "official and not private acts." Id.

We note that the Fourth Amendment and the protection afforded to citizens under the

Indiana Constitution do apply to a search or seizure by a party who is acting as an "instrument or agent" of the government. Bone, 771 N.E.2d at 714. Two critical factors in the "instrument or agent" analysis are (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends. Id.

In this case, Branscomb argues that the receipt should have been excluded from the evidence because Shoff was cooperating with the police during the investigation. Tr. p. 121. However, the evidence presented at trial demonstrated that Shoff searched Branscomb's vehicle on his "own initiative," and the police officers never said anything to Shoff regarding a potential search. Id. at 206. Indeed, Officer McQuaire was not even aware of the search until after it had already occurred. Id. at 123. Thus, there is no evidence that the police approved of, or acquiesced in Shoff's search. Moreover, it is apparent that Shoff's goal in conducting the search was not to assist law enforcement. Rather, Shoff merely desired the return of his gas card and wanted to see if it was in Branscomb's vehicle. For these reasons, Branscomb's argument fails.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.